Supreme Court, U. S.
FILED
JUL 21 1976
MICHAEL RODAK, JR., CLERK

No. 75-1680

In the Supreme Court of the United States

OCTOBER TERM, 1976

ERNEST A. FATHEREE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

MICHAEL W. FARRELL,
FREDERICK EISENBUD,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1680

ERNEST A. FATHEREE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 2, 1976, and a petition for rehearing was denied on April 20, 1976. The petition for a writ of certiorari was filed on May 20, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's conviction for mailing extortionate letters or causing them to be mailed.

2. Whether the prosecutor's remarks during rebuttal argument denied petitioner a fair trial.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Illinois, petitioner was convicted on three counts of mailing or causing to be mailed letters containing threats to injure the addressee or another, in violation of 18 U.S.C. 876, and was sentenced to concurrent terms of five years' imprisonment. The court of appeals affirmed (Pet. App. A-1 to A-5).

The evidence showed that in December 1973 and January 1974, Mrs. A. W. Pickel received through the mails four unsigned, handwritten letters which threatened her life and that of her son if she did not leave large amounts of money ($10,000-$20,000) at designated locations (Tr. 17-23, 100).[1] All the envelopes bore cancelled United States postage stamps postmarked at various post offices in Illinois (Tr. 27-28, 134-135; Pet. App. A-4).

An FBI handwriting analysis expert testified that, based upon comparison of the handwriting on these letters and a handwriting exemplar obtained from petitioner, the addresses on the four envelopes and the entire first letter were written by petitioner, and that there was little doubt that petitioner had also written the other three letters (Tr. 209-210, 293; Pet. App. A-2). Petitioner offered no expert testimony to refute this evidence, although his counsel cross-examined the expert vigorously and at length (Tr. 248-293; Pet. App. A-3).

Petitioner presented three witnesses in support of his defense that someone else, particularly Earline Hayes, had written the letters (Tr. 312-354). Petitioner denied writing the letters or trying to extort money from Mrs. Pickel (Tr. 424, 425). Petitioner and his wife

[1]The FBI arranged for the deposit of a package at the designated drop-off site, but no attempt was made to pick it up (Tr. 47-49).

also testified that they were reasonably affluent and had a friendly relationship with the Pickels; petitioner indicated, however, that he had had a dispute with the Pickel's hired hand (Tr. 376-387, 409-420).

ARGUMENT

1. Petitioner contends (Pet. 6-8) that the evidence was insufficient to establish that he mailed the Pickel extortion letters or caused them to be mailed. However, viewed in the light most favorable to the government, *Glasser* v. *United States,* 315 U.S. 60, 80, the evidence was sufficient.

As the court of appeals correctly noted (Pet. App. A-4), proof of mailing or causing a mailing may be shown by circumstantial evidence. *E.g., United States* v. *Ring,* 513 F. 2d 1001, 1010 (C.A. 6); *Petschl* v. *United States,* 369 F. 2d 769, 772 (C.A. 8); *Smith* v. *United States,* 343 F. 2d 539, 543-544 (C.A. 5), certiorari denied, 382 U.S. 861. These four extortion letters were received in the mail and bore cancelled United States postage stamps. The uncontradicted expert handwriting testimony established that petitioner had written at least one and probably all of the letters and had addressed all their envelopes. Under these circumstances, the court of appeals correctly concluded (Pet. App. A-3, A-4) that the evidence was sufficient "for the jury to infer that 'the only reasonable inference to be drawn was that * * * [petitioner] caused or was directly associated with the mailing of the threatening letters.' "

2. Petitioner also contends (Pet. 8-9) that a statement made by the prosecutor in rebuttal argument denied him a fair trial.

In closing argument, petitioner's counsel repeated a defense first raised in his opening argument, that petitioner had no motive for attempting to extort money

from Mrs. Pickel, a social acquaintance, because of his wealth (Tr. 477-478). In rebuttal, the prosecutor stated (Tr. 488):

> Mr. Fatheree had some money. [His counsel] tells you there is no motive. Don't confuse motive with intent, ladies and gentlemen. They are not the same. You know what the cold hard facts of that are, that rich people don't commit crimes. It is only people like you and I that aren't rich that do. That is the cold hard facts.

Petitioner's counsel did not object to this statement until after the jury had retired to deliberate (Tr. 499-505).[2]

The prosecutor's remark was not improper. As the court of appeals correctly held (Pet. App. A-5), "[t]he government simply commented upon the defense. * * * The government cautioned the jury against confusing the issues [of motive and intent]. Comments made in response to a defense have been consistently upheld by the courts." In any event, the court properly held (*ibid.*) that the statement was "not so prejudicial or inflammatory so as to require the granting of a mistrial or a reversal on appeal." See *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 237-240; *United States* v. *Bowen*, 500 F. 2d 41 (C.A. 6), certiorari denied, 419 U.S. 1003.

---

[2]The record does not support petitioner's contention (Pet. 8-9) that counsel's failure to make an immediate objection was excusable because the prosecutor delivered the remark in a low voice as he approached the jury. The trial judge found that the prosecutor made this remark at the podium (Tr. 505).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

MICHAEL W. FARRELL,
FREDERICK EISENBUD,
Attorneys.

JULY 1976.